IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, A. D. 1905

No. 268

AYER & LORD TIE COMPANY
Plaintiff in Error

vs

THE COMMONWEALTH OF KENTUCKY, BY FRANK A. LUCAS, REVENUE AGENT OF SAID COMMONWEALTH,
Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR DEFENDANT IN ERROR

This action was originally instituted in the County Court of McCracken County, Kentucky, under Section 4241, Ky. Stats., by the Commonwealth of Kentucky, for the purpose of assessing for state, county and municipal taxation certain steamboats and barges belonging to the Ayer & Lord Tie Company.

The petition alleges that on the 15th day of September, in each of the years, 1899, 1900 and 1901, "said boats were en-

rolled, in accordance with the laws of the United States governing navigation, at the port of Paducah, in the County of McCracken and State of Kentucky; that, as required by the said laws of the United States governing navigation, the words "of Paducah, Ky.," were painted on the sterns of said steamboats; that said boats, when not in use, are kept at Paducah, Ky., and that the said port of Paducah is, and was, on each of said days, the home port of said steamboats;" that the barges were used in connection with the steamboats for the purpose of transporting railroad ties; that the said tie company was, on each of said days, the owner, seized of and in possession of said boats and barges; that said company had an office, on each of said days, in the City of Paducah, and that said steamboats and barges had not been assessed, nor taxes collected on them, for either of said years, by the State of Kentucky, County of McCracken or City of Paducah.

The answer admits the allegations of the petition, but sets up that the appellee is incorporated under the laws of Illinois, with its chief office at Chicago, Illinois; that it has several offices, located in different states, including one at Paducah; that the boats and barges in question are engaged in interstate commerce, and that their assessment and taxation under the authority of the State of Kentucky would be an interference with interstate commerce; that they occasionally touch at Paducah, but never to discharge cargo, but simply for the purpose of employing seamen, buying stores, etc.; denies that the home port of such boats is at Paducah, Kentucky, and denies the right of this state to assess or tax them. The answer, however, alleges that one, H. Baker, was the general manager of the transportation department of plaintiff in error,

the vessels in question herein; that said Baker was a
t of Paducah, and that **it was proper to enroll or register**
ssels at Paducah.

this answer a demurrer was entered by the State, which
erruled by the County and Circuit Courts of McCracken
. The State elected to stand by its demurrer and de-
to plead further, and judgment was rendered for the tie
ny. Upon appeal to the Kentucky Court of Appeals,
er, this judgment was reversed and the demurrer sus-
The case was then remanded to the McCracken Cir-
ourt, where upon hearing, the property was assessed.
efendant then appealed to the Kentucky Court of Ap-
where the judgment of the State Circuit Court was
d. From thence the action was brought, by writ of
to this Court.

ARGUMENT.

on the face of the petition, **a prima facie** case requiring
essment of these boats, as prayed for therein, is made
t least, the sufficiency of the petition was not challenged
ellee. The question then is, does the answer in this
resent facts which constitute a bar to their taxation?
ll discuss this question under two heads, viz:

Where are these vessels taxable?

Would the taxation of these vessels by the Kentucky
ities constitute an unwarranted interference with inter-
ommerce?

WHERE ARE THESE VESSELS TAXABLE?

e plaintiff in error, being a corporation created under
s of the State of Illinois, and having its chief office in

the City of Chicago, must be deemed as a matter of law, to have its domicile in that State and City.

The vessels are enrolled, in pursuance of the laws governing navigation, at Paducah, Kentucky, and, in compliance with those laws, have the words, "Of Paducah, Ky.," painted upon their sterns.

While, for purposes of taxation, the general rule is that "**mobilia sequuntur personam,**" such is by no means the invariable rule, and in many cases tangible personal property acquires a situs for taxation foreign to the residence of its owner. This was recently decided by this Court in the case of Union Refrigerator Transit Co. vs. Kentucky, decided in November, 1905. This was, like the case at bar, an appeal from the Kentucky Court of Appeals, and your honors, Mr. Justice Brown writing the opinion, there held that refrigerator cars, belonging to a Kentucky corporation, and in use upon the railroads in various parts of the United States, were not taxable at the home office of the company, in Kentucky, but wherever they might chance to be on assesment day. This same principle was also announced by this Court in the case of Brown vs. Houston, 114 U. S., 622 (29 L. Ed., 257) and Union Refrig. Transit Co. vs. Lynch, 177 U. S. 149 (44 L. Ed., 708) and more recently in the case of Delaware, Lackawana & Western Ry. Co. vs. Pennsylvania, decided by this Court on May 15, 1905.

By our law every vessel, above a certain tonnage, is required to have a home port. The reason for this is very clearly and succinctly stated in the following language of the Kentucky Court of Appeals in this case, viz:

"Vessels engaged in navigation upon the high

seas, and upon the Great Lakes and rivers of the United States are often separated by long distances from the residences of their owners. Such vessels, in so far as they are the property of citizens of the United States, are governed by its laws. It has been deemed wise by the general government, from the earliest period of its existence, that all vessels engaged in interstate or international commerce should have a home port, where they are registered and enrolled, enjoy certain privileges, and are subject to certain burdens and duties; and, that all who have business transactions with them may know beyond question their home port, it is required by statute that its name shall be painted in a certain way upon the stern of each vessel."

This "home port" has long been held to be the situs of vessels for purposes of taxation. Judson on Taxation, Sec. 186; Hays vs. Pacific Mail Steamship Co., 17 How., 596 (15 L. Ed., 254); Morgan vs. Parham, 16 Wall., 471 (21 L. Ed., 303); St. Louis vs. Wiggins Ferry Co., 11 Wall., 423 (20 L. Ed., 192); Battle vs. Mobile, 9 Ala., 234, 44 Am. Dec., 438; Irvin vs. N. O., C. & St. L. R. R. Co., 94 Ill., 105, 34 Am. Rep., 208; Johnson vs. De Bary-Baya Merchants Line, 37 Fla., 499, 37 L. R. A., 518; People vs. Pacific Mail S. S. Co., 58 N. Y., 242; Yost vs. Lake Erie Trans. Co., 112 Fed. Rep., 746; and Newport vs. Berry, 14 Ky. L. Rep., 29. Judson, in his work on Taxation, cited supra, says:

> "Steamboats and vessels navigating the public or navigable waters of the United States, are taxable as property, **irrespective of the residence of the owner,** in the home port of the vessels, which is said to be their situs for taxation."

It follows, therefore, that when we shall have determined

the **home port** of the vessels in question in this case, we shall have determined their **situs for taxation.**

The allegation in the answer of plaintiff in error, that the "home port" of these vessels is not Paducah, Kentucky, being the statement of a mere conclusion of law, cannot be considered as conclusive, even on demurrer, and it becomes necessary therefore, to determine from the facts themselves, where their home port is.

By an act of Congress, which became a law December 31, 1792, (Sec. 4141, Rev. St., U. S., U. S. Comp. Stat., 1901, page 2808) it is provided:

> "Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides."

Sec. 4178 (U. S. Comp. St., 1901, p. 2830) provides:

> "The name of every documented vessel of the United States shall be marked upon each bow and upon the stern, and the home port shall also be **marked upon the stern.**"

Sec. 4334 (U. S. Comp. Stats., 1901, p. 2968) provides:

> "Every licensed vessel shall have her name, **and the port to which she belongs,** painted on her stern, in the manner prescribed for registered vessels; and if any licensed vessel be found without such painting, the owner thereof shall be liable to a penalty of twenty dollars."

The decisions above quoted were rendered under the foregoing statutes. Under these statutes the home port was fixed

at the residence of the owner, if there were but one, or, if more than one, the residence of the vessel's husband, or acting and managing owner, was such home port. The name of this home port was to be painted on the stern, and there the vessel was liable to state taxation, except in those rare cases where it had, by its use, acquired a fixed and definite actual situs in some other locality.

But this rule, requiring the vessel to be registered or enrolled at the port of registry nearest to the residence of the owner, was somewhat relaxed by an act of Congress, which became a law on June 26, 1884, entitled "An act to Remove Certain Burdens on the American Merchant Marine, and to Encourage the American Foreign Carrying Trade, and for other purposes," by which it was provided:

> "That the word 'port' as used in Secs. 4178 and 4334 of the Revised Statutes, in reference to painting the name and port of every registered or licensed vessel on the stern of such vessel, shall be construed to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built or where one or more of the owners reside."

23 Stat. L., 58 (U. S. Comp. St., 1901, p. 2831.)

Under this last quoted act the owner, instead of being compelled to claim as the home port of his vessel the port of registry nearest to which he resided, was given the option of selecting any one of three places, viz: The port where the vessel was registered or enrolled, the place in the same district where the vessel was built, or where one or more of the owners reside. And, having made his choice, it became his duty, under the law, to indicate that choice by painting the

name of the port so selected on the stern of the boat.

With this law the Ayer & Lord Tie Co. has complied f
It registered its vessels at Paducah, Ky., and selected that
as the **home port** of its vessels and indicated the fact it
made such selection by painting the words "of Paducah, K
on the stern of each of said vessels. So that Paducah ther
became their home port and situs for taxation.

In addition to the fact that Paducah, Ky., was the h
port of these boats and their legal situs for taxation, we h
it as undisputed in this case that said boats, when not in u
are kept at Paducah; that they touch there for the purpose
buying stores, employing seamen, etc.; that the appellant
an office in that city; and that its manager in charge of s
boats resides in that city. When we consider these facts
connection with the fact that Paducah was chosen by app
lant as the home port of its boats, and so held out by it to t
world, the conclusion is, we submit, irresistible that Paduc
is not only the legal but the proper situs of these vessels f
taxation.

We do not think we can do better, in concluding th
part of our brief, than to quote from the language of th
decision of the Kentucky Court of Appeals in this case, givin
a few of the reasons why the vessels in question should b
taxed at Paducah rather than Chicago. That Court says:

> "The steamboats involved in this litigation ar
> separated from the residence of their owner by a long
> distance, in both geography and time; in fact, they
> can never visit the port at which their owner resides;
> they are, so far as their actual situs is concerned, per-
> manently confined to the rivers over which they float.
> If their home port had to be Chicago, because that is

the residence of their owner, as under the law prior to 1884, then they would have a home port from which they could derive no advantage or protection, because they could never reach it. It was to obviate this hardship, with others, that the act of 1884 was passed by Congress, permitting their owners to select for them a home port in the field of their operations, which is for them a home port in fact, as well as in law and name. Property, such as that under consideration, ought, logically, to be taxed at its home port; there it can be seen and properly valued for assessment by the fiscal officers; whereas, at the residence of its owner (Chicago), the officers, of necessity, must rely on the statements of the latter for both its existence and its value. At its home port it enjoys the protection of the laws of the jurisdiction in which it is located, and both justice and reason would seem to require that property thus permanently located, both in legal contemplation and in fact, within a jurisdiction foreign to that of its owner, should contribute its fair share to the support of that government whose protection it enjoys."

We come now to consider the reasons urged by the plaintiff in error, the Tie Company, why these vessels should not be assessed at Paducah. Truly, its counsel urge some strange reasons.

And first, as to the barges. It is said that because these barges are not enrolled or registered, have not the words "of Paducah, Ky.," painted on their sterns, and are not alleged to be kept in Paducah when not in use, they cannot be taxed there. But these barges are not required to be registered or enrolled at Paducah or anywhere else, or to have the name of that city, or any other city painted on their sterns, so that

their failure to do what the law does not require does not argu against the right of the State of Kentucky, or any other stat to tax them. It is simply a fact which has no bearing on th case at all.

What is alleged is that these barges are used, **in connectio with the steamboats in question,** for towing ties. The steam boats are tow-boats, and without barges to tow, would be o little value. The barges being used in connection with the boats, and being essential to the use of the latter, are taxable wherever the boats are taxable. All belonging to the same fleet, they are all taxable at the same place. The boats lie up at Paducah when not in use, and it is fair to presume, we think, in the absence of any showing to the contrary, and in view of the fact that the barges cannot navigate without the boats, and that the boats are of no account without the barges, that the barges are kept in the same place as the boats.

The case of Commonwealth vs. American Dredge Co., 122 Pa., 386, cited by counsel for plaintiff in error, is not at all in point, for the reason that the barges and dredges in that case were all unregistered, and there was no registered or enrolled vessel in the fleet. If there had have been, is it not reasonable to suppose that the home port of the vessel towing the barges and dredges would have been considered the **situs** for taxation of the barges and dredges, which were accompanying it, used in connection with it, and owned by the same company? We confidently expect that your honors will hold the barges to be taxable at the same place as the boats.

As to the steamboats the contention of counsel for the tie company seems to be that while the home port of a vessel, as indicated by her registry or enrollment, and by the name

carved on her stern, may be her situs for taxation, still if that registry or enrollment is made by an unauthorized person, it amounts to nothing and does not bind the company. This may or may not be true, but where in this case do we find anything to indicate that the boats were so registered or enrolled by an unauthorized person? It is asserted in the brief of counsel for the company that these boats were registered or enrolled at the port of Paducah by H. Baker, general manager of the transportation department of said company. But in making this assertion counsel are traveling somewhat outside the record. What the answer says is this:

> "Defendant, further answering, says that H. Baker, upon whom notice in this case was served, was, during the years 1899-1900, the general manager of the transportation department of the said Ayer & Lord Tie Co., of its said steamboats, Russell Lord, Pavonia, and in 1901 of steamer Inverness and its barges, and for convenience sake, and under the act of Congress, said steamers were enrolled or registered at the port of Paducah, Ky., and said Baker, being a resident of the State of Kentucky, and in which port it is proper to register or enroll said boats."

This answer does not allege that the vessels were registered by H. Baker, and does not say by whom they were registered, but it does say they were registered under the act of Congress and at the proper port. For aught that the record discloses H. Baker may or may not have registered the boats, and he may or may not be secretary or president of the Company. Even if all that plaintiff in error says in its brief were true, still this statute is merely directory, and it is not to be presumed that every person who deals with a vessel on the faith of its register or enrollment shall have the duty imposed

upon him of finding out who registered or enrolled the vessel. Nor is the State, in alleging the enrollment or registry of these vessels, compelled to allege by whom they were so registered, in order to make its allegation good, any more than it would, in alleging the incorporation of a company, be compelled to allege each step in the said incorporation. At any rate, H. Baker was the agent of the tie company, and it is bound by his acts within the apparent scope of his authority. Under this enrollment or registry, the plaintiff in error permitted the words "of Paducah, Ky.,," to remain on the sterns of their vessels for years, and if this enrollment is not good, they were without any legal enrollment.

It is most strenuously urged in the brief of counsel for plaintiff in error that the vessels could only be enrolled at Chicago; and that the enrollment or registry of these vessels at Paducah was contrary to law and unauthorized and void. However, in their answer, which they had the campany make, and in the part quoted above, they say the boats are registered and enrolled at Paducah, "**in which port it is proper to register or enroll said boats.**" We suppose that beyond doubt the answer governs in this matter, and merely call attention to it in order to show the inconsistency of their contention, and the need they now feel of shifting their ground. As to the right of the company to register or enroll its vessels at Paducah and to claim that port as their home port, enough is said in other portions of this brief to clearly demonstrate that it had that right.

Counsel for plaintiff in error fall into another serious mistake in assuming that the home port of a vessel is always the place of residence of the owner, or rather the port of registry

nearest the residence of the owner, and say that the law does not require the home port of the vessel to be painted upon its stern. To demonstrate the falsity of this position, however, only requires that the statutes shall be examined. Sec. 4178, Rev. Stats., as amended by the acts of 1891 and 1897 (as quoted **supra**) requires that "**the home port shall also be marked upon the stern.**" The section then proceeds to describe the kind of letters that shall be used in so marking the boat. Sec. 4334, Rev. Stats. (alsa quoted **supra**) uses the words "Every licensed vessel shall have her name, **and the port to which she belongs,** painted on her stern." This word "port," as used in these two sections, was defined by the act of June 26, 1884, quoted above, (Comp. Stats., 1901, p. 2831), to mean either the **port where the vessel is registered or enrolled,** or the place in the same district where the vessel was built or where one or more of the owners reside. By this act the owner is given the right to choose either of these three places as the vessel's home port, and the selection, when made, is to be indicated by painting the name of such home port, so selected, on the stern of the vessel, and when this is done it ends the matter and the home port is fixed.

It is contended, however, on behalf of plaintiff in error, even in the face of these plain statutory provisions, that the name of this port, to be painted on the stern, is not the name of the home port. But if not, what is it? It is not the place of registry, or enrollment, because that is only one of three places that may be so painted. It is not the place of residence of the owner, for the same reason. Is this name required to be painted merely for ornamentation, or to serve some useful purpose? And if it is not to indicate the selection, within the

law, made by the owner of a home port, what is its purpose?

This same contention was urged upon the Kentucky Court of Appeals by plaintiff in error, in a petition for a rehearing. That Court overruled the petition for a rehearing, and after calling attention to the wording of these statutes, quoted above, says:

> "The argument of counsel for appelle that the act of 1884, while changing the meaning of the word 'port' in Sections 4178 and 4334, left it unchanged as used in Section 4141, amounts to this: That the Congress of the United States, after a policy continued throughout a century, requiring the name of the home port to be painted on the stern of the vessels, suddenly changed that policy without any apparent reason, and permittted the name of a port which was not the home port to be painted thereon. We think that Congress required the name of the home port to be painted on the stern of the vessel for a wise and useful purpose, enabling all persons who had dealings with them to know where they belonged, and we are not willing to lightly adopt a construction that it was intended by the act of 1884 to leave the place where the owner resides as the home port of the vessel, and yet permit the name of another port to be painted upon the stern. This construction would not only fail to enable persons dealing with vessels to know of certainty their home port, but it would absolutely mislead by permitting false information to be hung out under governmental sanction."

(See 79 S. W., 290.)

Prior to the passage of the act of June 26, 1884, the port of registry of vessels and the residence of the owner must necessarily be the same, or near each other, because the owner had no option but to register or enroll his vessels at the port of

istry "at or nearest to which" the owner usually resided. case of Morgan vs. Parham, 16 Wall., 471, cited by counsel the tie company, arose under these old statutes, and New k, which was both the place of registry and the residence he owner of the vessels in question, was held to be their s for taxation. In St. Louis vs. Wiggins Ferry Co., 11 l., 423, we have another case which arose under these old utes. The owners lived in East St. Louis, Ill., which was a port of registry, and the nearest port of registry was St. is. The owners in that case had no option as to what ld be painted on the stern, and what was painted did not eate, under the statutes as they then existed, the **home** , but merely the port of registry. The same may be said he case of Mayer, et al. vs. Baldwin, 57 Ala., which counsel plaintiff in error also cite.

In the case of Yost vs. Lake Erie Trans. Co., 112 Fed. , 746, the vessels were held to be taxable at their **home , as indicated by the name of such home port painted upon r sterns.** In this case the owners chose as such home port roe, Mich., the place of incorporation of the company, er than Detroit, the place of registry. In the case at bar owner has chosen as such **home port** the port of registry nrollment, rather than its place of incorporation. It had ight to choose either, and the one chosen becomes thereby home port of the vessels, and their place of taxation.

As to the cases cited by counsel for plaintiff in error, to that, as regards liens for supplies furnished vessels, the dence of the owners is to be considered the home port, er than the port of registry, we think it sufficient to say all these cases arose prior to the act of June 26, 1884,

quoted above, except the one case of the Marion G. Harris, 81 Fed. Rep., 964, and in this case there was no registry at all, except a fraudulent one.

The state rests its case upon the propositions that vessels are taxable at their **home port**; that the **home port** is, either the place of registry or enrollment, the residence of one or more of the owners or the place where the vessel was built; that the owner may select either of these three as the vessel's **home port**, and indicate his selection by painting the name of such port on the stern of the vessel; that in the case at bar the owners have so selected and so indicated the port of enrollment, which is Paducah, Ky.; that the vessels, when not in use, are kept at Paducah; that the company has an office there; that the manager of these vessels lives there; and that there is where the vessels come to purchase supplies and employ seamen.

WOULD THE TAXATION OF THESE VESSELS BY THE KENTUCKY AUTHORITIES CONSTITUTE AN UNWARRANTED INTERFERENCE WITH INTERSTATE COMMERCE?

The facts of this case need but to be understood to negative this proposition, and consequently, as these facts are detailed elsewhere herein, we shall content ourselves with stating the law, and citing a few of the many authorities bearing upon the proposition. Plaintiff in error, in its brief, says nothing upon this point, but it is raised by its answer, and we feel that it should receive some notice at our hands.

If we have succeeded in demonstrating that the home port of these vessels is Paducah, and that that city is their **situs** for taxation, then they are taxable there, if any vessels at all are

subject to state taxation, and this we do not think will be denied. In Moran vs. New Orleans, 112 U. S., 69 (28 L. Ed., 655), his Court lays down the principle that vessels "may be taxed by state authority as property, provided, the tax be not a tonnage tax, is levied only at the port of registry and is valued as other property in the state."

These vessels are, it is true, engaged in interstate commerce—are instruments by means of which such commerce is carried on. But still they are only property within the State of Kentucky. No state can lay any tonnage tax, or lay any tax on interstate commerce itself, but the principle has always been recognized that the instruments by which interstate commerce was carried on were subject to state taxation as property wherever they might be situated, provided only that they were not discriminated against because of their occupation. Lou. & Jeff. Ferry Co. vs. Com., 22 Ky. L. Rep., 446; C. C. C. & St. L. Ry. Co. vs. Backus, 154 U. S., 439 (38 L. Ed., 1041); Henderson Bridge Co. vs. Com., 17 Ky. L. Rep., 389; Henderson Bridge Co. vs. Kentucky, 166 U. S., 150 (41 L. Ed., 953); Morgan vs. Parham, 16 Wall., 471 (21 L. Ed., 303). We really feel that it is useless, and an imposition upon the valuable time of this Honorable Court, as well as a reflection upon its knowledge of the law, to multiply authorities upon a proposition as elementary as this. Almost every one of the thousands of vessels that ply the noble oceans, lakes and rivers that surround and flow through our country, are more or less engaged in interstate commerce, but this does not relieve them from paying state taxes. These boats in the case at bar occupy similar positions, and must bear the same burdens.

We think that the motion by the tie company to remove

this case to the Federal Court was correctly overruled by the State Courts, for the reason that the Commonwealth of Kentucky is not a citizen within the meaning of the statute authorizing a removal of an action to the Federal Court upon the ground of diversity of citizenship. Upshur County vs. Rich, 135 U. S., 467 (34 L. Ed., 196); In re City of Chicago, 64 Fed. Rep., 897; Arkansas vs. K. & T. Coal Co., 183 U. S., 185 (46 L. Ed., 144); Pennington vs. Woolfolk, 3 Ky. L. Rep., 42; Baldwin vs. Shine, 8 Ky. L. Rep., 496; C., St. L. & N. O. R. R. Co. vs. Commonwealth, (Ky.) 72 S. W., 1119.

Respectfully submitted,

TAYLOR & LUCAS,

Attorneys for Defendant in Error.

Paducah, Ky., March, 1906.

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